

MALIA A. BAKER, )  
 )  
 Plaintiff, ) No. CV-12-00132-CI  
 )  
 v. ) ORDER GRANTING DEFENDANT'S  
 ) MOTION FOR SUMMARY JUDGMENT  
 )  
 CAROLYN W. COLVIN, Commissioner )  
 of Social Security,<sup>1</sup> )  
 )  
 Defendant. )

BEFORE THE COURT are cross-Motions for Summary Judgment. ECF No. 17, 20. Attorney Maureen J. Rosette represents Malia A. Baker (Plaintiff); Special Assistant United States Attorney Jeffrey R. McClain represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. ECF No. 3. After reviewing the administrative record and briefs filed by the parties, the court **GRANTS** Defendant's Motion for Summary Judgment and **DENIES** Plaintiff's Motion for Summary Judgment.

<sup>1</sup>Carolyn W. Colvin became the Acting Commissioner of Social Security on February 14, 2013. Pursuant to FED. R. CIV. P. 25(d, Carolyn W. Colvin is substituted for Michael J. Astrue as the Defendant in this suit. No further action need be taken to continue this suit. 42 U.S.C. § 405(g).

**JURISDICTION**

On May 4, 2009, Plaintiff filed a Title XVI application for supplemental security income alleging disability beginning September 15, 2001. Tr. 20.<sup>2</sup> Plaintiff reported that she could not work due to "Bipolar Disorder I, Intermittent Psychotic Features, PSA in remission, ADHD, Borderline Personality Disorder, Cutting Self Borderline Personality Disorder with Intermittent Psychotic Features . . . Bi-polar schizoaffective disorder." Tr. 151. Plaintiff's claim was denied initially and on reconsideration, and she requested a hearing before an administrative law judge (ALJ). Tr. 82-128. A hearing was held on September 23, 2010, at which medical expert Donna Mary Veraldi, Ph.D., vocational expert Jinnie L. Lawson and Plaintiff, who was represented by counsel, testified. Tr. 36-81. ALJ Marie Palachuk presided. Tr. 36. The ALJ denied benefits on October 15, 2010. Tr. 20-31. The instant matter is before this court pursuant to 42 U.S.C. § 405(g).

**STATEMENT OF THE CASE**

The facts of the case are set forth in detail in the transcript of proceedings and are briefly summarized here. At the time of the hearing, Plaintiff was 46 years old, five foot five inches, and weighed 200 pounds. Tr. 49-50. She is divorced, has one adult child, and she lives with her mother. Tr. 50; 56. She completed high school, and has worked as an administrative assistant, a paralegal, a library assistant and a bookkeeper. Tr. 50.

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<sup>2</sup>The court notes the discrepancy in reported dates of filing, but in light of the disposition of this case, the discrepancy is immaterial. See, Tr. 82-83; 146.

1 Plaintiff testified that she was a heroin user off and on for  
2 decades, and she "truly, truly quit" in May 2010. Tr. 55-56.  
3 Plaintiff also testified that she hears 60-cycle hums, whispering  
4 and voices that grow louder when she is near electronics. Tr. 56-  
5 57. Plaintiff said she has tried to commit suicide several times.  
6 Tr. 57-58. She said her medications help, but do not completely  
7 eliminate the voices. Tr. 58. In describing her condition,  
8 Plaintiff said that despite the medication, she still experiences  
9 weeks of mania, followed by weeks of depression. Tr. 61-62.

10 Plaintiff said she can perform simple household chores, but she  
11 makes mistakes. Tr. 68. Plaintiff also said she spends much of her  
12 day reading and praying, and she walks the dog. Tr. 65; 69.  
13 Plaintiff attends mental health counseling three times per week.  
14 Tr. 67. She uses the public bus for transportation. Tr. 67.

15 Plaintiff testified that she does not trust people, and that  
16 people make her "close down," feel frightened, and if this anxiety  
17 gets severe, she cuts herself. Tr. 71-72.

#### 18 ADMINISTRATIVE DECISION

19 At step one, ALJ Palachuk found that Plaintiff had not engaged  
20 in substantial gainful activity since May 4, 2009. Tr. 22. At step  
21 two, she found Plaintiff had the severe impairments of attention  
22 deficit hyperactivity disorder, schizoaffective disorder with  
23 delusions, bipolar disorder and polysubstance addiction disorder.  
24 Tr. 22. At step three, the ALJ determined Plaintiff's impairments,  
25 including her substance use disorders, meet sections 12.02, 12.03,  
26 12.04, and 12.09 of 20 C.F.R. Part 404, Subpart P, Appendix 1 (20  
27 C.F.R. § 416.920(d)). Tr. 23. The ALJ found that if claimant  
28

1 stopped the substance use, the remaining limitations would cause  
2 more than a minimal impact on Plaintiff's ability to perform basic  
3 work activities and, therefore, she would continue to have a severe  
4 impairment or combination of impairments. Tr. 24. However, the ALJ  
5 concluded that if Plaintiff stopped the substance use, she would not  
6 have an impairment or combination of impairments that meet or  
7 medically equal one of the listed impairments in 20 C.F.R., Subpart  
8 P, Appendix 1 (20 C.F.R. 416.920(d). Tr. 24. The ALJ also found  
9 that if Plaintiff stopped the substance use, she would have the  
10 residual functional capacity ("RFC") to perform a full range of work  
11 at all exertional levels but with the following nonexertional  
12 limitations:

13 [T]he claimant would have sufficient attention and  
14 concentration to understand, remember, and complete  
15 simple, routine and repetitive tasks involving up to three  
16 step commands, but is unable to engage in production rate  
17 pace of work and should work in jobs that focus on the  
18 meeting of goals. She can only have occasional  
interaction with the general public and will require an  
essentially isolated position with only occasional  
supervision. The claimant will require an occasional (up  
to one per day) unscheduled break if her symptoms become  
severe.

19 Tr. 25. In step four findings, the ALJ found the discrepancies in  
20 Plaintiff's testimony about her mental limitations along with the  
21 evidence in the record "diminish the persuasiveness" of Plaintiff's  
22 subjective complaints and alleged limitations. Tr. 27. The ALJ  
23 also found that if Plaintiff stopped substance use, she would be  
24 unable to perform past relevant work. Tr. 29. At step five, the  
25 ALJ found that if Plaintiff stopped the substance use, a significant  
26 number of jobs in the national economy exist that Plaintiff could  
27 perform, such as housekeeping cleaner, pricer/marker and laundry  
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1 worker. Tr. 29-30.

## 2 STANDARD OF REVIEW

3 In *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9<sup>th</sup> Cir. 2001), the  
4 court set out the standard of review:

5 A district court's order upholding the Commissioner's  
6 denial of benefits is reviewed *de novo*. *Harman v. Apfel*,  
7 211 F.3d 1172, 1174 (9th Cir. 2000). The decision of the  
8 Commissioner may be reversed only if it is not supported  
9 by substantial evidence or if it is based on legal error.  
10 *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999).  
11 Substantial evidence is defined as being more than a mere  
12 scintilla, but less than a preponderance. *Id.* at 1098.  
13 Put another way, substantial evidence is such relevant  
14 evidence as a reasonable mind might accept as adequate to  
15 support a conclusion. *Richardson v. Perales*, 402 U.S.  
16 389, 401 (1971). If the evidence is susceptible to more  
17 than one rational interpretation, the court may not  
18 substitute its judgment for that of the Commissioner.  
19 *Tackett*, 180 F.3d at 1097; *Morgan v. Commissioner of*  
20 *Social Sec. Admin.*, 169 F.3d 595, 599 (9th Cir. 1999).

21 The ALJ is responsible for determining credibility,  
22 resolving conflicts in medical testimony, and resolving  
23 ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th  
24 Cir. 1995). The ALJ's determinations of law are reviewed  
25 *de novo*, although deference is owed to a reasonable  
26 construction of the applicable statutes. *McNatt v. Apfel*,  
27 201 F.3d 1084, 1087 (9th Cir. 2000).

28 It is the role of the trier of fact, not this court, to resolve  
conflicts in evidence. *Richardson*, 402 U.S. at 400. If evidence  
supports more than one rational interpretation, the court may not  
substitute its judgment for that of the Commissioner. *Tackett*, 180  
F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9<sup>th</sup> Cir. 1984).  
Nevertheless, a decision supported by substantial evidence will  
still be set aside if the proper legal standards were not applied in  
weighing the evidence and making the decision. *Browner v. Secretary*  
*of Health and Human Services*, 839 F.2d 432, 433 (9<sup>th</sup> Cir. 1988). If  
substantial evidence exists to support the administrative findings,

1 or if conflicting evidence exists that will support a finding of  
2 either disability or non-disability, the Commissioner's  
3 determination is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-  
4 1230 (9<sup>th</sup> Cir. 1987).

#### 5 SEQUENTIAL PROCESS

6 The Commissioner has established a five-step sequential  
7 evaluation process for determining whether a person is disabled. 20  
8 C.F.R. §§ 404.1520(a), 416.920(a); see *Bowen v. Yuckert*, 482 U.S.  
9 137, 140-42 (1987). In steps one through four, the burden of proof  
10 rests upon the claimant to establish a prima facie case of  
11 entitlement to disability benefits. *Tackett*, 180 F.3d at 1098-99.  
12 This burden is met once a claimant establishes that a physical or  
13 mental impairment prevents him from engaging in his previous  
14 occupation. 20 C.F.R. §§ 404.1520(a)(4), 416.920(a)(4). If a  
15 claimant cannot do his past relevant work, the ALJ proceeds to step  
16 five, and the burden shifts to the Commissioner to show that (1) the  
17 claimant can make an adjustment to other work; and (2) specific jobs  
18 exist in the national economy which claimant can perform. *Batson v.*  
19 *Commissioner of Social Sec. Admin.*, 359 F.3d 1190, 1193-94 (2004).  
20 If a claimant cannot make an adjustment to other work in the  
21 national economy, a finding of "disabled" is made. 20 C.F.R. §§  
22 404.1520(a)(4)(I-v), 416.920(a)(4)(I-v).

#### 23 ISSUES

24 The question presented is whether substantial evidence exists  
25 to support the ALJ's decision denying benefits and, if so, whether  
26 that decision is based on proper legal standards. Plaintiff argues  
27 that the ALJ erred by failing to properly weigh the medical  
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1 evidence. ECF No. 18 at 9-14.

2 **DISCUSSION**

3 Plaintiff contends that the ALJ failed to provide "specific,"  
4 "legitimate reasons supported by substantial evidence," ECF No. 18  
5 at 13, for rejecting the opinions of Dr. Arnold and Dr. Cavenee.<sup>3</sup>  
6 ECF No. 18 at 9-14.

7 **A. John Arnold, Ph.D.**

8 Plaintiff argues that the ALJ failed to set forth specific and  
9 legitimate reasons for rejecting Dr. Arnold's opinion that Plaintiff  
10 has marked limitations in her ability to relate appropriately to  
11 coworkers and supervisors, as well as respond appropriately to and  
12 tolerate the pressures and expectations of a normal work setting.  
13 ECF No. 18 at 13. Defendant responds that the ALJ properly  
14 incorporated Dr. Arnold's check-the-box form evaluation into his  
15 narrative opinion, which was adopted by the ALJ. ECF No. 20 at 4-5.

16 \_\_\_\_\_  
17 <sup>3</sup>Plaintiff devotes a single sentence to an alleged claim that  
18 the ALJ "relied on the testimony of [non-examining] Dr. Veraldi,  
19 over the opinions of examining sources." ECF No. 18 at 12. It is  
20 not clear from this abbreviated reference that Plaintiff intends to  
21 raise an issue related to whether the ALJ erred by according too  
22 much weight to the opinion of the non-examining, testifying  
23 physician. However, in the absence of meaningful analysis and  
24 citation to the record, the court should not address this issue.  
25 *See Carmickle v. Comm'r Soc. Sec. Admin.*, 533 F.3d 1155, 1161 n.2  
26 (9th Cir. 2008)(the court ordinarily will not consider matters on  
27 appeal that are not specifically and distinctly argued in an  
28 appellant's opening brief).

1 As a general rule, more weight should be given to the opinion  
2 of a treating source than to the opinion of doctors who do not treat  
3 the claimant. *Lester v. Chater*, 81 F.3d 821, 830 (9<sup>th</sup> Cir. 1995).  
4 The opinion of an examining physician is entitled to greater weight  
5 than the opinion of a nonexamining physician. *Pitzer v. Sullivan*,  
6 908 F.2d 502, 506 (9th Cir. 1990); *Gallant v. Heckler*, 753 F.2d 1450  
7 (9th Cir. 1984). The ALJ must provide "clear and convincing"  
8 reasons for rejecting the uncontradicted opinion of an examining  
9 physician. *Pitzer*, 908 F.2d at 506. If contradicted by another  
10 doctor, an examining doctor's opinion can be rejected only for  
11 "specific and legitimate reasons that are supported by substantial  
12 evidence in the record." *Morgan*, 169 F.3d at 603-604. The ALJ gave  
13 "great weight" to the opinion from Dr. Arnold that found Plaintiff  
14 had marked limitations in cognitive and social factors. Tr. 27.  
15 The ALJ also noted that Dr. Arnold opined that if Plaintiff stopped  
16 using drugs and alcohol, she would be able to perform certain work  
17 activities. Tr. 27.

18 Dr. Arnold examined Plaintiff on June 18, 2010, and completed  
19 a Psychological/Psychiatric Evaluation form. Tr. 632-45. On the  
20 form, Dr. Arnold indicated that Plaintiff had "marked," or "very  
21 significant interference" in three areas of ability: (1) to exercise  
22 judgment and make decisions; (2) to relate appropriately to co-  
23 workers and supervisors; and (3) to relate appropriately to and  
24 tolerate the pressures and expectations of a normal work setting.  
25 Tr. 635. In response to the directive on the form, "describe what  
26 the individual is capable of doing despite his/her impairments," Dr.  
27 Arnold opined:



1 Ms. Baker will be able to remember locations and simple  
2 work like procedures. She will be able to understand,  
3 remember and carry out simple verbal and written  
4 instructions. She will be able to concentrate for limited  
5 periods. She will be able to make simple work related  
6 decisions. She will be able to ask simple questions. She  
7 will be able to accept instructions. She will be aware of  
8 normal hazards and take appropriate precautions. She will  
9 be able to travel in unfamiliar places and use public  
10 transportation.

11 Tr. 635. As Defendant points out, Plaintiff's RFC incorporated  
12 significant portions of Dr. Arnold's opinion. Particularly, the RFC  
13 limits Plaintiff to "simple, routine and repetitive asks," which  
14 reflects Dr. Arnold's opinion that she will be able to understand,  
15 remember and carry out simple instructions. Simply put, the record  
16 reveals that the ALJ incorporated Dr. Arnold's opinions in  
17 Plaintiff's RFC. As such, Plaintiff's claim that the ALJ rejected  
18 Dr. Arnold's opinion is not supported by the record.

19 **B. Gerald Cavenee, Ph.D.**

20 Plaintiff argues that the ALJ erred in weighing Dr. Cavenee's  
21 opinion because Dr. Cavenee opined that the effects of Plaintiff's  
22 substance use on her current mental health were negligible and she  
23 was compliant with methadone treatment. ECF No. 18 at 8.

24 Gerald Cavenee, Ph.D., examined Plaintiff on May 24, 2010, and  
25 completed a Psychological/Psychiatric form. Tr. 623. Dr. Cavenee  
26 noted that Plaintiff was diagnosed with substance abuse or  
27 dependence, but opined "effects on current [mental health] are  
28 negligible, remains [clean/sober] on methadone, is compliant with  
such treatment." Tr. 621. Dr. Cavenee opined that Plaintiff had  
several severe limitations in performing routine tasks without undue  
supervision, interacting safely and effectively in a work setting

1 with limited public contact, and in performing effectively in a work  
2 setting. Tr. 621. Dr. Cavenee noted that Plaintiff needed  
3 medication and psychotherapy and "is quite incapable of gainful  
4 employment . . . her ability to work cannot be determined until  
5 stability is attained. [Mental health] attention needs to continue  
6 for work to ever be possible." Tr. 622.

7 The reasons the ALJ gave for discounting Dr. Cavenee's opinion  
8 was that at that time, Plaintiff was suffering from opioid  
9 dependence, and the opinion was contradicted by later medical  
10 evaluations conducted after Plaintiff stopped using substances. Tr.  
11 29. An individual is not considered disabled if alcoholism or drug  
12 addiction is a contributing factor material to the determination  
13 that the individual is disabled. 42 U.S.C.S. § 423(d)(2)(C);  
14 1382c(a)(3)(J). The ALJ's discounting of Dr. Cavenee's opinion was  
15 proper, because Dr. Cavenee examined Plaintiff when she was still  
16 undergoing "agonist therapy."<sup>4</sup> Tr. 620. As a result, Dr. Cavenee's  
17 opinion was of little value in determining Plaintiff's limitations  
18 when she is not experiencing the effects of drug use, or replacement  
19 medication for drug dependence.

20 The second reason the ALJ provided for discounting Dr.  
21 Cavenee's opinion was that it was inconsistent with later medical  
22 evaluations. Contrary opinions from other medical sources is a  
23 specific and legitimate reason to reject an examining physician's  
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25 <sup>4</sup> "Agonist therapy" is a prescribed replacement medication  
26 intended to diminish, and eventually eliminate, the patient's  
27 original drug dependence. Diagnostic and Statistical Manual of  
28 Mental Disorders, Text Revision, pp. 32-4 (4th ed. 2000).

1 opinion. *Tonapetyan v. Halter*, 242 F.3d 1144, 1149 (9<sup>th</sup> Cir. 2002).

2 Moreover, the record supports the ALJ's conclusion. For  
3 example, on June 29, 2010, examining physician John Tran, M.D.,  
4 noted that Plaintiff admitted she had been "off her medications for  
5 awhile." Tr. 670. Dr. Tran also noted that Plaintiff's "[j]udgment  
6 is good enough, knows she needs to follow treatment, knows that  
7 medications help her, and she has a lot of insight." Tr. 671.  
8 Additionally, after reviewing the record, Dr. Veraldi testified that  
9 without substance use, Plaintiff's functional limitations in daily  
10 activity living is mild, social functioning is mild to moderate, and  
11 concentration, persistence and pace is moderate with "episodic  
12 periods where it gets marked if she is having significant problems  
13 with either mania or depression." Tr. 47. The medical record  
14 supports the ALJ's determination that Dr. Cavenee's opinion was  
15 contradicted by other physicians. As such, the ALJ's reasons for  
16 giving little weight to Dr. Cavenee's opinion were specific and  
17 legitimate and supported by the record.

#### 18 CONCLUSION

19 Having reviewed the record and the ALJ's findings, the court  
20 concludes the ALJ's decision is supported by substantial evidence  
21 and is not based on legal error. Accordingly,

#### 22 IT IS ORDERED:

23 1. Defendant's Motion for Summary Judgment, **ECF No. 20**, is  
24 **GRANTED**.

25 2. Plaintiff's Motion for Summary Judgment, **ECF No. 17**, is  
26 **DENIED**.

27 The District Court Executive is directed to file this Order and  
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1 provide a copy to counsel for Plaintiff and Defendant. Judgment  
2 shall be entered for **DEFENDANT** and the file shall be **CLOSED**.

3 DATED August 12, 2013.

4  
5 S/ CYNTHIA IMBROGNO  
6 UNITED STATES MAGISTRATE JUDGE  
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